STATEMENT FOR THE RECORD

OF

PARALYZED VETERANS OF AMERICA

FOR THE

HOUSE COMMITTEE ON VETERANS' AFFAIRS

CONCERNING

DRAFT BILL: VETERANS APPEALS IMPROVEMENT

AND MODERNIZATION ACT OF 2017

MAY 2, 2017

Chairman Roe, Ranking Member Walz, and members of the Committee, Paralyzed Veterans of America (PVA) would like to thank you for the opportunity to offer our views on the draft bill entitled, "Veterans Appeals Improvement and Modernization Act of 2017."

Initial Considerations

PVA employs a highly-trained force of over 70 service officers who develop veterans' claims for both member and non-member clients. These frontline employees spend a minimum of two years in specialized training. We maintain a national appeals office staffed by attorneys and legal interns who represent clients at the Board of Veterans' Appeals (Board). We also have attorneys who practice before the Board, the Court of Appeals for Veterans Claims (CAVC), and the United States Court of Appeals for the Federal Circuit. Of all the major Veteran Service Organizations (VSO), only PVA offers such continuity of representation throughout subsequent appellate review.

Our most important attribute, though, is that our service officers and attorneys consistently advocate for catastrophically disabled veterans. Complex claims are the norm, not the exception. As we attempt to bring greater efficiency to the claims and appeals system, our perspective is geared toward ensuring that the due process rights of the most vulnerable among us—those most deserving of benefits—are not watered down for the sake of expediency.

PVA's unique aspects discussed above should illustrate the point that this Committee should not judge the importance of an organization's input based on the volume of claims it processes. We fear that in the absence of further hearings on this subject, Congressional consideration of a piece of legislation with the propensity to impact multiple generations of veterans will have been

relegated to a single hearing, with a single panel of witnesses. In addition to the structure of this hearing, a bias toward the "three veterans service organizations with the most members" is also evident in the draft bill itself. Congress and stakeholders alike have repeatedly praised the Department of Veterans Affairs (VA) for its unprecedented level of collaboration. Encouraging VA to abandon that method now on the cusp of implementing a program of this scope is incomprehensible. It is within this Committee's power to influence the level of VSO involvement going forward, and PVA highly suggests that any bill introduced includes a mandate for continued collaboration with all the VSOs who participated in the original consultations in March 2016.

Background

The number of pending appeals is approaching 500,000. VA projects that if we fail to address the process, within a decade the average wait time for resolving an appeal will reach 8.5 years. We believe reform is necessary, and we support this legislation moving forward.

There is no shortage of news articles and academic pieces that attempt to illustrate for readers the level of complexity and redundancy in the current appeals process. It is a unique system that has added layer after layer of substantive and procedural rights for veterans over the years. The most notable aspect differentiating it from other U.S. court systems is the ability for a claimant to inject new evidence at almost any phase. While this non-adversarial process offers veterans the unique ability to continuously supplement their claim with new evidence and seek a new decision, it prevents VA from accurately identifying faulty links in the process, whether it be individual raters or certain aspects of the process itself.

It is important that as we approach this major issue that we do not lose sight of the fact that veterans have earned these benefits through the highest service to their country and have every right to pursue these earned benefits to the fullest. As we promote and seek public support for change, it is easy to use statements such as, "there are veterans who are currently rated at 100% who are still pursuing appeals," to illustrate the problems that pervade the system. PVA will be the first to point out, though, that a veteran rated at 100% under 38 U.S.C. § 1114(j) might also be incapacitated to the point that he or she requires 24 hour caregiver assistance. A 100% service-connected disability rating does not contemplate the cost of this care, and veterans may seek special monthly compensation (SMC) to the tune of thousands of dollars needed to address their individual needs. Few people would disagree that pursuing these added disability benefits are vital to a veteran's ability to survive and maintain some level of quality of life. Without clarification, such statements lead people to believe that veterans are the problem.

This is why PVA believes it is so important to ensure that VSO's remain as involved in the follow-on development process and implementation as they are now if this plan is to succeed. This is a procedural overhaul, and VSO's are the bulwark that prevents procedural change from diluting the substantive rights of veterans.

The Framework

As the working group came together and began considering ways to address the appeals inventory, it became clear that a long-term fix would require looking beyond appeals and taking a holistic view of the entire claims process. The work product in front of us today proposes a system with three distinct lanes that a claimant may enter following an initial claims decision—the local higher-level review lane, the new evidence lane, and the Board review lane. The work horse in this system is the new evidence lane. The other two serve distinct purposes focused on correcting errors. A decision to enter any of the lanes must be made within one year of receiving the previous decision. Doing so preserves the effective date relating back to the date of the original claim—a key feature of this new framework.

When a claimant receives a decision and determines that an obvious error or oversight has occurred, the local higher-level review lane, also known as the difference of opinion lane, offers a fast-track ability to have a more experienced rater review the alleged mistake. Review within this lane is limited to the evidence in the record at the time of the original decision. It is designed for speed and to allow veterans with simple resolutions to avoid languishing on appeal.

If a claimant learns that a specific piece of evidence is obtainable and would help him or her succeed on their claim, the new evidence lane offers the option to resubmit the claim with new evidence for consideration. VA indicates that its goal is a 125-day turn around on decisions within this lane. Another important aspect is that the statutory duty to assist applies only to activity within this lane. This is where VA will concentrate its resources for developing evidence.

The third lane offers an appeal to the Board. Within this lane there are two tracks with separate dockets. One track permits the addition of new evidence and option for a Board hearing. The other track permits a faster resolution by the Board for those not seeking to supplement the record. A claimant within this track will not be permitted to submit new evidence, but they will have an opportunity to provide a written argument to accompany the appeal.

If the claimant receives an unfavorable opinion at the Board, he or she may either revert to the new evidence lane within one year or file a notice of appeal with the CAVC within 120 days. Notably different from earlier versions of this legislation, this draft bill would preserve the claim's effective date even after an adverse decision at the Court.

Concerns Specific to the Framework

Throughout the development of this new framework, PVA's biggest concern has been the proposed dissolution of the Board's authority to procure an independent medical examination or opinion (IME) under 38 U.S.C. § 7109. An IME is a tool used by the Board on a case-by-case basis when it "is warranted by the medical complexity or controversy involved in an appeal case." § 7109(a). The veteran may petition the Board to request an IME, but the decision to do so remains in the discretion of the Board. The Board may also request an IME *sua sponte*. Experienced Board personnel thoroughly consider the issues which provoke the need for an

outside opinion. Complicating the process further, the CAVC has carefully set parameters for the proposed questions to be answered by experts. A question presented to a medical expert may be neither too vague, nor too specific and leading. A question too vague renders the opinion faulty for failing to address the specific issue, while a question too specific tends to lead the fact finder to a predisposed result.

The standard for granting such a request is quite stringent. 38 C.F.R. 3.328(c) states, "approval shall be granted only upon a determination . . . that the issue under consideration poses a medical problem of such obscurity or complexity, or has generated such controversy in the medical community at large, as to justify solicitation of an independent medical opinion." The number granted each year usually amounts to no more than one hundred, with approximately fifty percent of those IME's being requested by the Board itself. The regional offices have long held a companion authority under 38 U.S.C. § 5109. Incredibly, in a room full of practitioners convened in March 2016 as part of this current reform process, not one among them could recall an instance of a rating officer requesting an IME. And yet the original proposal was to eliminate the Board's authority to procure an IME and rely solely on a rating officer exercising his or her authority under § 5109.

VA's rationale for dissolving this authority is primarily based on having all development of evidence take place at the Agency of Original Jurisdiction (AOJ) level in the New or Supplemental Evidence Lane. This unwavering desire to rid the Board of any development stems in part from an attempt to exploit its experienced Veteran Law Judges (VLJ) to the greatest possible extent. VLJ's who adjudicate appeals are a human capital commodity and form a critical component of the system. Because employees and outside attorneys cannot reach the experience and qualifications of a VLJ overnight, VA is limited in its ability to scale this particular resource simply by hiring new employees.

These concerns are valid to a degree, and we have worked with officials to find a solution that allows the Board to realize the benefit of making the best use of VLJ's while attempting to preserve the beneficial aspects of IME's procured by the Board. Part of the mitigating measures are reflected in this draft bill's proposed amendments to 38 U.S.C. § 5109, permitting the Board to remand specifically for procurement of an IME and requiring the VLJ to articulate the specific questions to be presented to the expert.

We remain concerned, however, with the remand language. As written, the Board would only be permitted to remand for an IME if it determined an error existed on the part of the AOJ to satisfy its duty to assist under 38 U.S.C. § 5103A. We recommend striking this requirement. First, the existing statute explicitly renders an IME discretionary. VA's failure to employ a discretionary tool cannot, by definition, be considered a violation of a compulsory duty to assist. These two statutory provisions are diametrically opposed and cannot be reconciled. Second, should these statutory parameters be reconciled, there are still situations where the AOJ carried out its duty to assist, but the Board determines an IME is warranted. An IME might be needed when the AOJ procured advisory medical opinions from its own staff doctors, but the medical question is of

such complexity that the Board feels only an expert can shed light on the appropriate decision. There could be multiple conflicting medical opinions in need of resolution, or an IME could be used to avoid conflicts of interest in claims under 38 U.S.C. § 1151 for medical malpractice.

None of these circumstances would violate the AOJ's duty to assist under a plain-language reading of the statute. Of course, we would also note that some of these situations could easily be resolved if VA would better adhere to its own reasonable doubt provision when adjudicating claims. We still see too many VA decisions where this veteran-friendly rule is not properly applied. More often it appears VA raters exercise arbitrary prerogative to avoid ruling in favor of the claimant, adding obstacles to a claimant's path without adequate justification. While due diligence in gathering evidence is absolutely necessary, too often it seems that VA is working to avoid a fair and legally acceptable ruling favorable for the veteran. Both the failure to accept and tendency to devalue non-VA medical evidence are symptoms of this attitude.

Dissolving § 7109 would have the additional effect of abolishing the centralized office of outside medical opinions. This small staff has played a vital role in facilitating IME's and maintaining their effectiveness by developing relationships with doctors who are experts on particular subjects and willing to do this tedious task for almost no money. This office not only expedites the receipt of opinions, but it also ensures a high level of quality. VA has committed verbally to PVA that it will preserve this resource by moving it from the Board and placing it under VBA's management, in essence making it available to the AOJ going forward.

The decreased efficiency with having the process conducted at the AOJ level is also concerning. Instead of the VLJ requesting an IME and receiving the opinion, now a second person must review the claim—the rating officer who received the file on remand. If a veteran wishes to appeal this re-adjudication, we have asked for and received VA's commitment to reroute the appeal by default, with exceptions, back to the same VLJ who remanded the case to avoid yet another person from having to review a claim with enough medical complexity to warrant the IME. Unless this Committee is willing to outright preserve § 7109, we would strongly recommend that the Committee conduct oversight on these specific commitments by VA, perhaps as part of the increased reporting requirements.

We also recommend an additional jurisdictional safeguard for the Board. In 38 U.S.C. § 7104, it would be helpful to include language that addresses situations where the Board finds that an appeal presents extraordinary circumstances. The Board, in its sole discretion, should be able to retain jurisdiction over a remand of that appeal.

Some stakeholders have expressed concern over the replacement of the "new and material" evidence standard with "new and relevant." It is true that there are a number of appeals in the system currently disputing a decision that evidence submitted was not deemed "material." The stated concern is that changing "material" to "relevant" will simply exchange one appealable issue for another. While it is a fair point, "relevant" is a significantly lower legal threshold and as higher numbers of veterans meet this threshold, it should correlate to fewer appeals. Those

expressing concern propose having VA simply accept all "new" evidence and make a decision. Under this proposal, if the evidence is so weak that it is not even relevant, then VA can easily deny the claim. For every denial, VA will be required to do the work of providing the improved notice explaining its decision. Conversely, a legal determination that new evidence is not relevant would not be subject to this requirement, thus a reduced workload for VA. PVA believes "new and relevant" is an acceptable standard for veterans to meet. But at this point, it is unclear whether dealing with continued appeals on relevance determinations or processing improved notice for denials will lead to a greater aggregate negative impact on the system.

Earlier objections were raised concerning the specificity with which a veteran was required to identify issues of fact or law being contested on appeal in a notice of disagreement. At first glance, the prior language appeared to be quite "legalese" requiring a sophisticated level of pleadings. Placing such burden on veterans would be at odds with the non-adversarial nature of the system. We are pleased to see that the current draft bill has addressed this issue.

Judicial Review

We noted above that this draft bill would preserve a claim's effective date following an adverse decision from CAVC. It would also provide the same relief after an adverse decision from the Federal Circuit and the Supreme Court of the United States. The concept of imposing finality after a Court decision has provoked a significant debate among the stakeholders. Unfortunately, the strongest objections to imposing finality at the Court have not been met with much discussion regarding why VA, or some of the other stakeholders, are comfortable with finality at that stage. We would encourage the Committee to draw out this discussion and fully examine the issue. There are arguments and perspectives on both sides that warrant attention.

Our initial impression is that while VA is trying to create new efficiencies in its claims and appeals processing, we must remember that the CAVC is not part of that system, and it does not exist for VA's benefit or efficiency. Nor does it exist to create precedent. Precedent is a byproduct of an individual availing him or herself of the Court. The Court exists to hear veterans' individual claims and gives veterans an independent avenue to challenge whether VA considered a claim correctly. We in the veterans community fought long and hard for judicial review, and it is precious. PVA is uniquely positioned in this regard. Our organization has boxes full of claims that, but for the Court, the veteran would never have had a full and fair review. When we approach analyzing the impact on the Court, we should not focus on the systematic efficiencies or precedent, because these are not the Court's purpose. We should focus on what an individual veteran's right to judicial review is and what it takes to avail him or herself of that right.

There are reasonable assertions that failing to provide effective date relief following a Court decision will have a chilling effect on the Court. They should be addressed unless willing to be conceded. One scenario presented is where a veteran, who having received a denial under what she believes is an erroneous application of law to the case, also has new evidence to attach to the

claim. She is faced with deciding whether to pursue Court review on the legal issue or circulate back through the system with new evidence. If she chooses the Court and loses, she can still continue to pursue the claim with new evidence, but she will have lost her effective date. If she chooses to handle the new evidence first, her claim will again be adjudicated under what she considers to be an erroneous interpretation of law. This predicament, so the argument goes, will likely force veterans to choose to avoid the Court at the risk of missing an opportunity to strengthen the record. Hence the chilling effect. It also inconveniences the veteran by having them cycle through the system while being again scrutinized under a misinterpretation of the law.

One might argue, though, that there is no chilling effect in this scenario. The veteran is in fact inconvenienced. But ultimately, if the veteran cycles through again with the new evidence, strengthening the record, she arrives in the exact same position if denied, this time without the predicament. The choice is obvious, and she heads to the Court. The only person in this scenario who ultimately would not reach the Court is one who received an earlier and favorable adjudication at a lower level of review. This is precisely what we want for veterans. Any reduction in claims reaching the Court would be attributed to more efficient outcomes for the veterans. Making a decision about the framework that accommodates veterans facing this scenario also requires a belief that the veteran's legal interpretation is always correct and, necessarily, that VA's is always wrong. This is not how sound policy is formed. Further, it is hard to weigh at this point a single veteran's inconvenience in this scenario against the potential gains for numerous veterans who are benefitting from a more efficient system due to the finality imposed after a Court decision.

There is, perhaps, also an undue assumption that a chilling effect on the Court would in fact reduce precedent and oversight on VA. Conceptually, one may concede that a reduction in volume of claims at the Court raises the possibility that a "perfect case" for setting precedent will not arrive. But it is possible that a reduction in the Court's workload would offer greater opportunity to give more time and attention to a precedent-setting claim, which otherwise might have slipped through the cracks or not garnered a more thorough opinion.

There are other scenarios that argue in favor of granting effective date relief following review by the CAVC. If the Board rules against a veteran and finds that a medical exam being challenged was adequate for purposes of his rating decision, he is faced with two choices. He could appeal to the CAVC, or he could develop independent evidence that would strengthen his argument that the exam provided by VA was inadequate. The latter option costs money. If effective date relief followed a decision at the CAVC, the veteran could wait and see if the Court agreed with his position before he was forced to shell out money he likely does not have to invest in proving his claim. Veterans with means may not see this as an issue. For those without means, it would be an unwarranted obstacle in a system that is designed to be non-adversarial.

One aspect of this framework that has not been discussed at all is the fact that you can technically take one issue from a multi-issue claim up to the Court, and cycle back through the

other lanes in the framework on the remaining issues. Currently, the Court takes jurisdiction over issues that are expressly identified by the veteran, and issues not appealed after a Board decision are final. Nothing in this draft bill changes the way an issue reaches the CAVC. But because this new framework has provided liberal effective date relief, new incentives for action have been introduced. There should be further discussion among stakeholders and VA about how claims are dealt with that end up being split up between the Court and the agency. There is no precedent for this in the current system.

PVA was a supporter early on of judicial review, and we believe the availability of that review has improved the appeals process for veterans. Determining the best way to preserve that protection deserves more conversation at this point in time.

Implementation

We applaud the heavy reporting requirements found within this bill. One of the biggest reservations that the collective stakeholders have voiced is the absence of information related to implementation. GAO's recent report reinforced our claim that the success of this new framework hinges on how VA makes the transition, and VA has yet to fully demonstrate what it needs to accomplish this task. We also agree that it is important that VA provide a full accounting of the bases for certain assumptions that have been used to support the feasibility of this new framework. For example, what is the basis for the assumption that within the "hearing lane" at the Board, thirty-five percent of veterans will choose to have a hearing? What is the impact on the system if that estimate is drastically wrong?

Within the reporting requirements, we recommend including a mandate to track legacy appeals that have transitioned into the new system. The goal would be to ensure that Congress can easily identify how many legacy appeals have been truly resolved as opposed to being reclassified in the new system.

We support VA's proposed first step toward combatting the backlog of legacy appeals. One of the hurdles to permitting veterans with legacy appeals to join the new system was that veterans in the legacy system may not have been provided sufficient notice to make an educated decision. Allowing veterans to join after they have received a statement of the case or supplemental statement of the case addresses this concern and will help stem the flow of new claims into the old, broken system. The quicker we can shut off that valve, the quicker the backlog of legacy appeals will be handled.

We note in closing that this is not simply a VA problem. As stated earlier, PVA has many service representatives and spends a great deal of time, funds, and effort on ensuring they accomplish their duties at a high level of effectiveness. However, it is important that veterans and their representatives also share responsibility when appeals arrive at the Board without merit. A disability claim that is denied by VBA should not automatically become an appeal simply based on the claimant's disagreement with the decision. When a claimant either files an appeal on his own behalf, or compels an accredited representative to do so with no legal basis for

appealing, that appeal clogs the system and draws resources away from legitimate appeals. Since 2012, PVA has taken steps to reduce frivolous appeals by having claimants sign a "Notice Concerning Limits on PVA Representation Before the Board of Veterans' Appeals" at the time they execute the Form 21-22 Power of Attorney (POA) form. PVA clients are notified at the time we accept POA that we do not guarantee we will appeal every adverse decision and reserve the right to refuse to advance any frivolous appeal, in keeping with VA regulations.

PVA believes that substantial reform can be achieved, and the time is ripe to accomplish this task. Our organization represents clients with some of the most complex issues, and we cannot stress enough that moving forward should not be done at the expense of the most vulnerable veterans. We must remain vigilant and appreciate the benefits of bringing together the variety of stakeholders who are participating and bringing different perspectives and viewpoints—it is a healthy development process that ensures veterans remain the focus. Thank you, Mr. Chairman, for the opportunity to offer our input on this important legislation.

Information Required by Rule XI 2(g) of the House of Representatives

Pursuant to Rule XI 2(g) of the House of Representatives, the following information is provided regarding federal grants and contracts.

Fiscal Year 2017

Department of Veterans Affairs, Office of **National Veterans Sports Programs & Special Events** — Grant to support rehabilitation sports activities — $275,000.

Fiscal Year 2016

Department of Veterans Affairs, Office of **National Veterans Sports Programs & Special Events** — Grant to support rehabilitation sports activities — $200,000.

Fiscal Year 2015

Department of Veterans Affairs, Office of **National Veterans Sports Programs & Special Events** — Grant to support rehabilitation sports activities — $425,000.

Disclosure of Foreign Payments

Paralyzed Veterans of America is largely supported by donations from the general public. However, in some very rare cases we receive direct donations from foreign nationals. In addition, we receive funding from corporations and foundations, which in some cases are U.S. subsidiaries of non-U.S. companies.